



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Ashton

**Respondent:** SEM Limited

**Heard at:** London South Employment Tribunal  
(by remote video hearing)

**On:** 10-12 January 2022

**Before:** Employment Judge Ferguson

**Members:** Mr P Adkins  
Ms N Christofi

## Representation

Claimant: Mr D Curwen (counsel)

Respondent: Ms H McLorinan (counsel)

**JUDGMENT** having been sent to the parties on **17/1/22** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## INTRODUCTION

1. By a claim form presented on 26 October 2020 (following a period of early conciliation from 25 to 29 September 2020) the Claimant complained of unfair dismissal and discrimination arising from disability under s.15 of the Equality Act 2010 (“EQA”).
2. The agreed issues to be determined are as follows:

### Unfair dismissal

- 2.1. What was the reason or principal reason for dismissal? The Respondent says the reason was capability.

2.2. If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will consider, in particular, whether:

2.2.1. The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.2.2. The Respondent adequately consulted the Claimant;

2.2.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.2.4. Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

2.2.5. Dismissal was within the range of reasonable responses.

### **Remedy for unfair dismissal**

2.3. What basic award is payable to the Claimant?

2.4. If there is a compensatory award, how much should it be? The Tribunal will decide:

2.4.1. What financial losses has the dismissal caused the Claimant?

2.4.2. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.4.3. If not, for what period of loss should the Claimant be compensated?

2.4.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.4.5. If so, should the Claimant's compensation be reduced? By how much?

2.5. If the Claimant's claim succeeds on unfair dismissal only, it is agreed that the statutory cap of fifty-two weeks' pay would apply to any compensatory award.

### **Discrimination arising from disability (EQA section 15)**

2.6. It is agreed that the Claimant is a disabled person due to De Quervain's tenosynovitis.

2.7. Did the Respondent treat the Claimant unfavourably by dismissing her?

2.8. Did the Claimant's sickness absence between July 2018 to August 2020 arise in consequence of the Claimant's disability?

2.9. Did the Respondent dismiss the Claimant because of that sickness absence?

2.10. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

- 2.10.1. Ability to workforce plan
- 2.10.2. Ability to deal appropriately with ongoing employees
- 2.10.3. Ability to deal with HMRC appropriately

2.11. The Tribunal will decide in particular:

- 2.11.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
- 2.11.2. could something less discriminatory have been done instead;
- 2.11.3. how should the needs of the Claimant and the Respondent be balanced?

2.12. The Respondent accepts its knew that the Claimant had the disability at all material times.

### **Remedy for discrimination**

2.13. What financial losses has the discrimination caused the Claimant?

2.14. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

2.15. If not, for what period of loss should the Claimant be compensated?

2.16. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

2.17. Is there a chance that the Claimant's employment would have ended in any event? Should her compensation be reduced as a result?

2.18. Should interest be awarded? How much?

3. The hearing took place by Cloud Video Platform with the agreement of the parties because one of the participants in the hearing was required to isolate due to a positive Covid-19 test.

4. We heard evidence from the Claimant. On behalf of the Respondent we heard from Shannie Sinfield and Fiona Blyth.

### **FACTS**

5. The Respondent manufactures electrical motors for the machine tool industry. At the time of the Claimant's dismissal it employed around 140 people. The Claimant commenced employment with the Respondent as an assembly

operator on 12 June 2006. As at early 2017 the Claimant's role was to bond magnets to rotors using her thumbs and fingers.

6. On 29 August 2017 the Claimant was signed off work for two weeks with hand/wrist pain. Her sickness absence was extended and on 24 November 2017 she was diagnosed with "bilateral de Quervain's syndrome tenosynovitis" ("DQT"). This is a condition involving inflammation of the sheath surrounding the tendons to the thumbs. It causes pain in the wrists and hands.
7. The Claimant believes that her DQT was caused by her repetitive work for the Respondent. She accepts, however, that the Tribunal is not in a position to make any assessment or comment on the causation of the condition and she does not invite us to do so. The Claimant has brought separate personal injury proceedings against the Respondent.
8. A musculoskeletal consultant advised on 24 November 2017:

"You were seen today in the musculoskeletal upper limb clinic and were informed that you have bilateral R>L de Quervain's syndrome (patient advice leaflets provided). If in 6 weeks your symptoms have not settled with regular exercises, thumb/wrist splints and topical NSAID gels please ring the phone number below and we will book you a further appointment for steroid injection. ... Please discuss the option of alternative work duties with you manager and occupational health department at work."

9. The Claimant returned to work on or around 1 December 2017. At a return to work meeting the Claimant said she did not want to see an Occupational Health advisor at this stage. The Respondent would look at potential jobs the Claimant could do comfortably and rotate her job every two hours. The Claimant was also told to inform her manager if she was struggling with any of her tasks or feeling discomfort. It was agreed to review the situation weekly.
10. It is not in dispute that the Claimant worked on alternative duties that were less repetitive, rotating tasks every two hours, from this point until May 2018. During this time she was taken off working on magnets altogether.
11. On 12 December 2017 the Respondent's health and safety officer requested advice from Occupational Health, noting that the Claimant had been complaining of her hand/wrist still hurting. The Claimant attended a consultation with Occupational Health and a report was produced on 9 January 2018. The report noted that the Claimant's role had been modified which had helped to relieve the pain significantly. The Occupational Health physician advised that the Claimant remained fit to continue in her current modified role until seen by her specialist again to review the situation and consider a steroid injection. He said that even if the pain settles completely it was advisable that the Claimant should rotate among the various work tasks to avoid straining one particular group of muscle tendons. He said "Obviously, if Ms Ashton feels that the pain is too severe for her to tolerate, then both Ms Ashton and the employer will need to have an open discussion about the situation and, if feasible, to consider

redeployment to a suitable alternative role that doesn't involve repetitive manual work."

12. On 29 January 2018 the Claimant had a meeting with her manager and confirmed she was fit to continue in her modified role.
13. The Claimant had steroid injections in her wrists in late April 2018.
14. In April 2018 the Respondent undertook a disciplinary investigation following allegations the Claimant had been verbally abusive to a colleague. The allegation was upheld and the Claimant was issued with a first written warning. She did not appeal, but on 9 May 2018 she raised what was in effect a counter-grievance alleging bullying by colleagues. On 9 May she also commenced what would become a long period of absence on grounds of stress/ depression/ anxiety, triggered by the workplace dispute.
15. The Claimant remained signed off due to stress/ depression/ anxiety (not wrist pain) until September 2019, save for a period of five days in July 2018 when she returned and during that period she worked in a different "cell team".
16. The Claimant was referred again to Occupational Health in late 2018 and a report was produced on 18 January 2019. The report stated that the Claimant remained "psychologically affected by her concerns about work, arisen from what appears to be a minor conflict at work". She had had counselling which had brought up personal issues from the past "which have now become interwoven with her difficulties at work". The DQT was also mentioned, and it was noted the Claimant was expecting further injections and if they were not effective further options, including surgery, may be available to her. The report concluded that the Claimant did not feel able to return to work "due to concerns about work". Even if her concerns could be resolved, she did not "feel able to undertake her usual role, as she cannot tolerate the current pain/ discomfort in both wrists/ base of her thumbs". Neither the Occupational Health physician nor the Claimant were able to identify any additional support for the Respondent's consideration. A return to work was said to be unlikely for the foreseeable future.
17. At an absence review meeting on 17 April 2019 there was discussion of both the mental health problems and the Claimant's wrists. The Claimant reported that the injections had not worked and that surgery was the only option but even then there were no guarantees and she had not decided whether to go down that route. She reported that her hands were getting worse and she was struggling with day to day tasks.
18. On 7 May 2019 the Claimant attended an appointment with her wrist specialist. It was noted she was not in the right frame of mind for surgery at that time, but an appointment was made six weeks later to discuss it. There are no records of the subsequent appointment in the bundle, but on 23 July 2019 at an absence review meeting the Claimant told the Respondent the outcome was "basically that she can't have the operation". This was because there was only a 50% chance of success and it could make things worse overall.

19. From September 2019 onwards the Claimant's sick notes gave the reason she was unfit for work as wrist pain from DQT as well as anxiety and depression. The Claimant continued to submit GP certificates but otherwise there was little contact between the Claimant and the Respondent until June 2020. Shannie Sinfield for the Respondent said this was partly because the previous HR manager had left and another member of staff was acting up until Ms Sinfield was recruited to the position in June 2020. Ms Sinfield commenced employment with the Respondent as HR manager on 12 June 2020. She contacted the Claimant on 25 June 2020 by telephone. The Claimant told Ms Sinfield that her hand will not get any better. When asked about surgery the Claimant said she wanted to get a second opinion, but needed to wait until coronavirus was over. Ms Sinfield made a further Occupational Health referral.

20. An Occupational Health report was produced on 2 July 2020. It gives the reasons for referral as follows:

“According to the management referral, Ann has been absent from work since August 2017 and this is due to a combination of hand/wrist pain and stress and anxiety. Management have spoken to Ann recently and she has advised she has difficulty carrying out daily activities such as using a toothbrush due to discomfort affecting her hands. Ann has advised that she was offered an operation but she is hesitant to go down this route. From Ann's perspective, she has advised her hand condition has been caused by repetitive movements in her role. Ann was referred to Occupational Health for fitness for work advice.”

21. The report notes that the Claimant had reported her hand condition was worse compared to previously, and that she had difficulty with daily activities such as brushing her teeth or holding a cup of tea. It also notes “ongoing unresolved feelings and emotions relating to the past events at work”.

22. The report continues:

**“Health Management Plan**

Ann is under the care of her GP. I understand no further treatment is planned at present for her hand condition. Regarding her mental health symptoms, Ann informs me she is prescribed anti-depressant medication.

**Work Capability & Fitness**

Ann currently does not feel capable of returning to work. In my opinion, Ann is also not fit for work based on her current level of reported symptoms and function.

**Adjustments or Recommended Modifications to the Role**

I was unable to identify any adjustments that would help Ann return to work at present.

### **Barriers to a Successful Return to Work**

Ann perceives work factors were impacting on her health and wellbeing leading up to her absence from work.

### **Future Attendance/ Performance Potential**

Ann has been absent from work for a prolonged period of time and on speaking to her today, her condition has not improved compared to previously. Currently, no further treatment is planned that is likely to result in an improvement. Therefore, Ann is unlikely to be able to return to work in the foreseeable future.

### **Fitness to attend Management Meetings**

In my opinion, Ann would be fit to attend management meetings if required.

...

### **Answers to Specific Questions from the Referral Form**

1. In my opinion, Ann is currently not fit to undertake her substantive role.
2. Adjusted duties or temporary redeployment do not apply at present.
3. Ann perceives work factors impacting on her health and wellbeing leading up to her absence from work. There is no formal documentation to confirm this.
4. In my opinion. the disability provision of the Equality Act is likely to apply.
5. Based on her rate of progress so far, Ann is unlikely to be able to return to work in the short or long-term.
6. Ann perceives work factors impacting on her health and wellbeing. In this situation, being able to achieve a mutually agreeable resolution may help.
7. Currently, no further treatment such an operation is planned and Ann is self-managing her symptoms.
8. In my opinion, Ann would be fit to engage in meetings with management if required.

### **Additional Recommendations**

There are no additional recommendations.”

23. The Claimant was sent a copy of the report and invited to a meeting to discuss it. The meeting took place on 29 July 2020. During the meeting the Claimant confirmed that she agreed with the Occupational Health report. She said she had not decided about whether to have surgery and noted various factors against it including the uncertainty of success and a long recovery time. She said she was waiting for a call from the surgeon. The notes include the following:

“SS added that occupational health do not believe that any changes or adjustments will help or make any difference for AA. AA agreed there is nothing at SEM that she will be able to do with her hands and added that she knows SEM.

...

SS empathised that it was not a nice situation, and explained that if SEM could have made some reasonable adjustments, or consider another role for AA it would have made things a bit easier, but because occupational health have said there are no reasonable adjustments that they would recommend, it would be wrong of us to go against that. SS added that she wanted to be open and honest with AA and explain that end of employment was one of the possible outcomes”

24. Ms Sinfield gave evidence to the Tribunal that she spoke to a number of managers around this time to find out whether there were any roles the Claimant might be able to do. There were no vacancies and Ms Sinfield could not think of any suitable alternative roles the Respondent could create that would not involve the Claimant using her hands or would be a good match for her skills and experience.

25. The Claimant was invited to a further meeting on 3 August 2020 and was warned that dismissal was a possible outcome. The meeting took place and mainly involved discussions which are inadmissible in the unfair dismissal proceedings pursuant to s.111A of the Employment Rights Act 1996. We have not taken the notes of this meeting into account, nor any other documents which include discussions that are inadmissible under s.111A.

26. The Claimant did not say at any stage following the Occupational Health report of 2 July 2020 that she was likely to be able to return to work in the near future or that there were adjustments or other roles that would have facilitated her return.

27. On 19 August 2020 the Claimant was informed by telephone call and letter that her employment was being terminated with 12 weeks' pay in lieu of notice. The letter stated:

“We reviewed your current state of health and considered the latest medical report provided by PHC Occupational Health, dated 1<sup>st</sup> July 2020.



We also reviewed the possibility of making adjustments to your role in order to facilitate your return to work. However, following the advice from Occupational Health, this would not be feasible as their report states that they were unable to identify any reasonable adjustments that would support your return to work. You also confirmed that you do not feel capable of returning to work at present.

We also considered whether there was any reasonable alternative work you could undertake (either with or without adjustments). Occupational health also advised in their report that they do not believe you are fit to return to work in any capacity for the short or long term.

Having reviewed all of the above and considered all of the circumstances, we have decided that there is no reasonable prospect of you resuming full duties. It is with regret that we are therefore terminating your employment on the grounds of your continuing ill-health and its impact on your ability to carry out your role.”

28. Ms Sinfield was asked in her oral evidence to the Tribunal about the situation regarding possible surgery on the Claimant’s wrists. Her evidence was that she was aware the Claimant had said in 2019 she was not going to have surgery, and because of the length of time without any progress she formed the view it was unlikely the Claimant would make the decision to have surgery any time soon.
29. The Claimant appealed against her dismissal but did not give any reasons. An appeal hearing took place on 2 September 2020 conducted by Fiona Blyth, one of two joint managing directors of the Respondent. The Claimant said the basis for her appeal was that “she felt she had been unfairly dismissed and not adequately compensated and had not been treated fairly by SEM”. The Claimant said she had developed DQT at work and she was looking to be compensated for this. She wanted to be compensated “enough to last her until she retires as she cannot work again”. Ms Blyth said that the Claimant had been dismissed on the basis she cannot come back to work due to her condition and the Claimant had acknowledged that. The Claimant responded “that’s true”.
30. In September and October 2020 the Respondent undertook a large-scale redundancy exercise involving 27 redundancies of shop floor staff.
31. The Claimant accepted in cross-examination that she has still not had surgery on her hands. She said that her hands were somewhat better now and she would be able to work in a non-repetitive job. She said she had not been looking for work due to the Covid-19 pandemic.
32. Ms Blyth gave evidence that the Respondent had begun streamlining its staff before the pandemic hit in early 2020. This was due to “legacy” products being ended in 2018 and the Respondent moving to a model whereby its sole client was its parent company in Germany. They had already made the decision not

to replace any staff who left, as far as possible, and by the end of 2019 the company had “slimmed down” due to there being less complexity in the business.

## THE LAW

33. Pursuant to section 98 of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or “some other substantial reason”. One such reason is where the dismissal “relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do”. Capability is defined in section 98(3)(a) as “capability assessed by reference to skill, aptitude, health or any other physical or mental quality”.
34. According to section 98(4) the determination of the question whether the dismissal is fair or unfair “depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee” and “shall be determined in accordance with equity and the substantial merits of the case.”
35. In deciding whether in all the circumstances of the case it is reasonable to dismiss a particular employee, the Tribunal must not substitute its own view for that of the employer. The “range of reasonable responses” test must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed (see, e.g., Post Office v Foley and HSBC Bank v Madden [2000] IRLR 827).
36. Section 15 EQA provides:
- 15 Discrimination arising from disability**
- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B’s disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
- ...
37. It was suggested by Underhill LJ in O’Brien v Bolton St Catherine’s Academy 2017 ICR 737, CA, that the test of “proportionate means of achieving a legitimate aim” under s.15 is similar to the reasonableness test for unfair dismissal in a capability case. He did not go so far as to say it would be impossible for a Tribunal to reach different conclusions on the two complaints. It was not in dispute before us that, to the extent there is any difference in the standard of review, the test for justification under s.15 EQA is more stringent and involves consideration of the matters listed in the list of issues above.
38. As to evidence in support of an employer’s justification defence, Underhill LJ also commented (at paragraph 45):

“In principle the severity of the impact on the employer of the continuing absence of an employee who is on long term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt it will be obvious that the impact is very severe and that a general statement to that effect will suffice, but sometimes it will be less evidence and the employer will need to give more particularised evidence of the kind of difficulty that the absence is causing.”

## CONCLUSIONS

### Section 15 EQA

39. The Respondent does not accept that it treated the Claimant unfavourably by dismissing her. It accepts that ordinarily a dismissal would amount to unfavourable treatment, but says in the present case the evidence of the Claimant’s GP records shows that the Claimant had no intention of returning to work and indeed was intending to look for other jobs, but did not want to say this to the Respondent. We have not outlined that evidence or made any findings about it because our view is that even if we accepted that was the Claimant’s position, dismissal on grounds of capability would still amount to unfavourable treatment for the purposes of s.15. Even if the Claimant had no intention of returning, or indeed wanted her employment to end, there are many different ways in which a contract of employment might be terminated. The employee can resign, there could be termination via a settlement agreement, or there could be voluntary or compulsory redundancy. There is no evidence that the Claimant actively wanted to be *dismissed* on grounds of capability, as opposed to her employment ending in one of those other ways, and indeed the fact that she appealed against the decision indicates that she considered it detrimental to her. We are doubtful whether there would ever be circumstances in which a dismissal would not constitute unfavourable treatment for the purposes of s.15, and in this case we are satisfied that it did.
40. The Respondent also argues that the “something” relied upon by the Claimant, namely her “sickness absence between July 2018 and August 2020” did not arise in consequence of her DQT because she would have been off sick for that period due to her mental health issues in any event. We are not convinced that that analysis is correct. The DQT was certainly a factor in her sickness absence, at least for the period from September 2019 onwards. More fundamentally, though, we consider this takes an unduly restrictive approach to the “something” relied upon. Both parties agreed that the reason for dismissal given at the time was the Claimant’s “continuing ill-health and its impact on your ability to carry out your role”, and that it was a matter of semantics whether that, or the prior sickness absence, was the “something” arising in consequence of disability. We have therefore considered whether the reason given for dismissal, and in particular the Claimant’s “inability to carry out her role” was something arising from her DQT, and if so whether dismissal was justified.

41. Although the Occupational Health report of July 2020 referred to both the mental health issues and the DQT, the focus of the meetings between the Claimant and Ms Sinfield was the Claimant's DQT, its impact on her work and the likely prognosis. Even if the mental health issues remained a factor that would have needed to be considered before any return to work, the primary reason for Ms Sinfield's conclusion that the Claimant was unable to return to work was the wrist condition and the fact that it looked unlikely to resolve in the near future. That situation is something that arose from the Claimant's disability.
42. The main issue for us to determine, therefore, is whether the Claimant's dismissal was a proportionate means of achieving a legitimate aim. The burden of establishing justification is on the Respondent and the aims relied upon are:
- 42.1. Ability to workforce plan
  - 42.2. Ability to deal appropriately with ongoing employees
  - 42.3. Ability to deal with HMRC appropriately
43. Mr Curwen on behalf of the Claimant says these aims are not specific enough to be relied upon, or they cannot justify dismissal. He noted that the Respondent had not given any evidence of actual difficulties with workforce planning or reporting to HMRC, and argued that the Respondent cannot rely on a general assertion that keeping an employee on the books causes problems for employers in those ways. As to "dealing appropriately with ongoing employees", Mr Curwen argued that the burden of retaining the Claimant as an employee for longer, given that she was no longer in receipt of sick pay, was not substantial and her dismissal for that reason was not proportionate.
44. We accept that, in accordance with O'Brien, the Tribunal is entitled to expect evidence from the Respondent on the issue of the impact of a continuing absence of an employee on health grounds, but it was also noted in O'Brien that often "it will be obvious that the impact is very severe" and "a general statement to that effect will suffice". The amount of evidence required depends on the circumstances.
45. It is correct that the Respondent has not given any evidence of particular problems caused by the Claimant's absence in terms of workforce planning or reporting to HMRC, but Ms Sinfield has explained in her evidence that keeping someone notionally employed when they were highly unlikely to return "imposes unrealistic burdens", pointing out that the evidence shows the Respondent "took its duty to liaise with absent workers seriously and it was not viable to keep this obligation going when this would service no purpose."
46. We do not accept that the burden of retaining the Claimant as a "notional" employee was as light as Mr Curwen claims. The Claimant says the purpose of keeping her employed would have been to obtain greater clarity about treatment options and explore redeployment. This would have involved further referrals to Occupational Health as well as meetings with management. There

would potentially have needed to be further investigations about the surgery, waiting while the Claimant decided on it, possible further delay while waiting for the operation, recovery time and then further assessment of fitness to work. It would have been a considerable burden on the Respondent. Further, although the Claimant was not receiving sick pay, she would still have been accruing annual leave and length of service. It is entirely legitimate for an employer to wish to avoid, for the sake of both parties, an employee remaining notionally employed where there is no realistic prospect of return to work. We therefore accept that the Respondent is entitled to rely on the second of its claimed legitimate aims.

47. As to proportionality, the Claimant relies on two matters: first, the fact that there was a discrepancy between the Occupational Health report saying no further treatment was planned, and the Claimant telling Ms Sinfield that she was still considering surgery. The Claimant says the Respondent should have sought to clarify this with Occupational Health, and this made the Claimant's dismissal at that time disproportionate. Secondly, the Claimant says the Respondent failed to give proper consideration to redeployment.
48. On the issue of surgery, we consider that this argument cannot be sustained in circumstances where the Claimant agreed with the Occupational Health report at the time and never even suggested, let alone asked, for the Respondent to wait until she had made up her mind about surgery. Even if there was any ambiguity about whether she might have the surgery, it was legitimate for Ms Sinfield to take the view that the Claimant was so unlikely to have it, given the history, that it would not have been worth referring the matter back to Occupational Health.
49. As to redeployment, the Respondent's evidence is that there was nothing the Claimant could have done. We have no basis to doubt that. The Claimant has not challenged that evidence or given any contrary evidence other than mere assertion she could have done other roles, such as receptionist, trainer or working in "stores". The Claimant says there was discussion of a trainer role with her manager, but there is no documentary evidence of that. She did not say in any of the welfare meetings or any of the meetings leading up to her dismissal that there were other roles she could have done. On the contrary, the Claimant specifically said there was nothing at the Respondent she could do. She was also saying around this time, including in her appeal, that she would never be able to work again. Her single focus at that time was on the entirely separate issue of compensation for what she perceived to be an injury caused by her work. We also take into account the context of both the Covid situation which led to multiple redundancies in the autumn of 2020 and the prior streamlining of the business which Mr Blyth explained in her evidence. In light of all of that evidence, we accept Ms Sinfield's account that she considered the issue of adjustments or redeployment and there was nothing the Claimant could have done given the severity of her hand condition.
50. To the extent the Claimant suggests there was a failure to discuss redeployment following the first Occupational Health report in January 2018, the recommendation to consider alternative roles in that report was conditional on the pain becoming "too severe to tolerate". There is no evidence that that

point was ever reached. The Claimant had agreed that she was able to do the modified role that had been established in December 2017 and she remained at work, without apparent problems from her hands, until she went off sick in May 2018 for an unrelated reason. There was therefore no obligation on the Respondent to consider redeployment due to the Claimant's wrist condition at that stage.

51. The undisputed background was that the Claimant had been off sick for more than two years and there was no realistic prospect of a return to work in the short or long term. In all the circumstances we accept that dismissal was "appropriate and reasonably necessary" to achieve the aim of dealing appropriately with ongoing employees, i.e. to avoid the burden on the Respondent of keeping the Claimant notionally employed, that there was nothing less discriminatory that could have been done and that dismissal struck a fair balance between the needs of the Claimant and those of the Respondent. It was therefore proportionate and the complaint under s.15 EQA fails.

#### Unfair dismissal

52. It is not in dispute that the reason for dismissal was capability, which is a potentially fair reason. The issue for us is whether the Respondent acted reasonably or unreasonably in treating that as a sufficient reason to dismiss the Claimant.

53. The Claimant relies on the same matters as regards the unfair dismissal complaint as for the proportionality issue under s.15. For the same reasons, we do not accept those criticisms of the Respondent. Having found that the Claimant's dismissal was a proportionate means of achieving a legitimate aim, we also find that the Respondent acted reasonably for the purposes of s.98(4) of the Employment Rights Act 1996. In particular, we accept that Ms Sinfield had a genuine belief that the Claimant was incapable of performing her duties, that a fair process was followed and dismissal fell within the range of reasonable responses.

54. The unfair dismissal complaint therefore fails and is also dismissed.

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Employment Judge Ferguson

Date: 31 January 2022